

**Final Rule**

LSA Document #18-69(F)

**DIGEST**

Amends [760 IAC 1-21-2](#) concerning definitions. Amends [760 IAC 1-21-2.5](#) concerning proof of financial responsibility. Amends [760 IAC 1-21-7](#) regarding cash deposits. Amends [760 IAC 1-21-8](#) regarding surcharge for ancillary providers and anesthesiologist assistants. Amends [760 IAC 1-21-8.5](#) regarding surcharge for nursing homes. Effective 30 days after filing with the Publisher.

[760 IAC 1-21-2](#); [760 IAC 1-21-2.5](#); [760 IAC 1-21-7](#); [760 IAC 1-21-8](#); [760 IAC 1-21-8.5](#)

SECTION 1. [760 IAC 1-21-2](#) IS AMENDED TO READ AS FOLLOWS:

**[760 IAC 1-21-2](#) Definitions****Authority:** [IC 34-18-5-4](#)**Affected:** [IC 12-15-18-3](#); [IC 12-24-1-3](#); [IC 12-25](#); [IC 16-28](#); [IC 25-14-1-1.5](#); [IC 25-14-1-3](#); [IC 25-22.5](#); [IC 25-29-1-13](#); [IC 34-18](#)

Sec. 2. The following definitions and those contained in [IC 34-18-2](#) apply throughout this rule:

- (1) "Ancillary provider" means all health care providers as defined in [IC 34-18-2-14](#), except the following:
  - (A) Physicians.
  - (B) Nursing homes.
  - (C) Hospitals.
  - (D) Psychiatric hospitals.
- (2) "Claims made coverage" means coverage for claims made during a coverage period.
- (3) "Comprehensive nursing care" means nursing that includes, but is not limited to, any of the following:
  - (A) Intravenous feedings.
  - (B) Enteral feeding.
  - (C) Nasopharyngeal and tracheostomy aspiration.
  - (D) Application of dressings to wounds that:
    - (i) require the use of sterile techniques, packing, or irrigation; or
    - (ii) are infected or otherwise complicated.
  - (E) Treatment of Stages 2, 3, and 4 pressure ulcers or other widespread skin disorders.
  - (F) Heat treatments that:
    - (i) have been specifically ordered by a physician as part of active treatment; and
    - (ii) require observation by nurses to adequately evaluate the process.
  - (G) Initial phases of a regimen involving administration of medical gases.
- (4) "Dentist" means any person with a license to practice dentistry under [IC 25-14-1-3](#) not meeting the definition for dentist - oral surgery set forth in subdivision (5).
- (5) "Dentist - oral surgery" means any person with a license to practice dentistry under [IC 25-14-1-3](#) treating patients with general anesthesia as defined by [IC 25-14-1-1.5](#) in an office setting.
- (6) "Department" means the Indiana department of insurance.
- (7) "Employed physician" means a physician for whom an employer:
  - (A) withholds and pays Social Security and Medicare taxes; and
  - (B) pays unemployment tax;on wages paid to the physician. The term does not include a physician that is treated as an independent contractor for purposes of the Internal Revenue Service.
- (8) "For-profit facility" means a nursing home not meeting the definition for not-for-profit facility as defined in subdivision (13).
- (9) "Independent ancillary provider" means an ancillary provider that holds a state-issued license to provide health care and functions in an advanced role at a specialized level through the application of advanced knowledge and skills in the provision of health care. The term includes, but is not limited to, the following:
  - (A) A dentist.
  - (B) A psychologist.
  - (C) A podiatrist.
  - (D) An optometrist.
  - (E) A nurse practitioner.

- (F) A nurse midwife.
- (G) A certified registered nurse anesthetist.
- (H) A physician assistant.
- (I) A clinical nurse specialist.

**(J) An anesthesiologist assistant.**

- (10) "Insurer" means any entity that issues a policy of insurance used as proof of financial responsibility under [IC 34-18](#) including, but not limited to, an insurance company doing business on an admitted or nonadmitted basis or a risk retention group.
- (11) "IRMIA" means the Indiana residual malpractice insurance authority created by [IC 34-18-17](#).
- (12) "Medical director" means a licensed physician whose duties primarily relate to oversight of the following:
- (A) Program policies and procedures.
  - (B) Program development.
  - (C) Improvement of quality of care.
  - (D) Compliance.
  - (E) Supervision.
- (13) "Not-for-profit facility" means a nursing home that is owned by a nonprofit corporation, governmental entity, or other organization that is exempt from federal income tax under Section 115 or 501, or both, of the Internal Revenue Code of 1986, as amended, or the corresponding provisions of any future United States Internal Revenue law.
- (14) "Nurse midwife" means a certified nurse midwife as defined at [848 IAC 3-1-1](#).
- (15) "Nursing home" means a facility named on the license issued by the state department of health under [IC 16-28](#).
- (16) "Occurrence coverage" means coverage for acts that occur during a coverage period.
- (17) "PCF" means the Indiana patient's compensation fund.
- (18) "PCF certificate of insurance" means the form prescribed by the department to show proof of financial responsibility as required by [IC 34-18-3-2](#)(1) to become a qualified provider.
- (19) "Physician" means an individual with an unlimited license to practice medicine under [IC 25-22.5](#).
- (20) "Podiatrist – no surgery" means any podiatrist, as defined by [IC 25-29-1-13](#), not meeting the definition for podiatrist – surgery set forth in subdivision (21).
- (21) "Podiatrist – surgery" means a podiatrist, as defined by [IC 25-29-1-13](#), performing any procedure requiring an anesthetic, including a local anesthetic as defined by [845 IAC 1-1-1](#) or intravenous or gaseous sedation, including postoperative treatment. Exceptions to these procedures include the following:
- (A) Diagnostic and therapeutic injections.
  - (B) Surgical procedures involving the nails.
  - (C) Excision of skin lesions.
  - (D) Incision and drainage of abscesses.
  - (E) The treatment of ulcers.
- The term includes podiatric physicians assisting in surgery.
- (22) "Psychiatric hospital" means an inpatient facility that is a private institution licensed under [IC 12-25](#) and public institutions under the administrative control of the director of a division as designated by [IC 12-24-1-1](#) or [IC 12-24-1-3](#) and includes a private mental health institution, as defined by [440 IAC 1.5-1-8](#), and a private psychiatric institution, as defined by [IC 12-15-18-3](#).
- (23) "Qualified actuary" means an individual that is a member in good standing with the Casualty Actuarial Society of the American Academy of Actuaries who has been approved as qualified for signing casualty loss reserve opinion by the Casualty Practice Council of the American Academy of Actuaries.
- (24) "Reporting endorsement" means coverage that extends the time a claim may be made beyond the final claims made policy period. A reporting endorsement is commonly referred to as tail coverage.
- (25) "Residential nursing care" means nursing that includes, but is not limited to, any of the following:
- (A) Identifying human responses to actual or potential health conditions.
  - (B) Deriving a nursing diagnosis.
  - (C) Executing a minor regimen based on a nursing diagnosis or executing minor regimens as prescribed by any of the following:
    - (i) A physician.
    - (ii) A physician assistant.
    - (iii) A chiropractor.
    - (iv) A dentist.
    - (v) An optometrist.
    - (vi) A podiatrist.
    - (vii) A nurse practitioner.
    - (viii) A clinical nurse specialist.

(Department of Insurance; Reg 22, Sec II; filed Jan 27, 1977, 2:35 p.m.: Rules and Regs. 1978, p. 514; filed Apr 29, 1999, 2:22 p.m.: 22 IR 2874; readopted filed Sep 14, 2001, 12:22 p.m.: 25 IR 531; filed Mar 18, 2005, 10:45 a.m.: 28 IR 2375; filed Feb 2, 2007, 3:08 p.m.: [20070228-IR-760060032FRA](#); filed Apr 18, 2011, 11:34 a.m.: [20110518-IR-760100245FRA](#); filed May 29, 2012, 3:22 p.m.: [20120627-IR-760120046FRA](#); readopted filed Nov 26, 2013, 3:43 p.m.: [20131225-IR-760130479FRA](#); filed May 18, 2018, 2:25 p.m.: [20180613-IR-760180069FRA](#))

SECTION 2. [760 IAC 1-21-2.5](#) IS AMENDED TO READ AS FOLLOWS:

**[760 IAC 1-21-2.5](#) Insurance policy as proof of financial responsibility**

**Authority:** [IC 34-18-3-7](#); [IC 34-18-5-2](#); [IC 34-18-5-4](#); [IC 34-18-6-6](#)

**Affected:** [IC 27-1](#); [IC 27-4-5-2](#); [IC 34-18-2-14](#); [IC 34-18-3](#); [IC 34-18-4](#); [IC 34-18-15-4](#); [IC 34-18-17](#)

Sec. 2.5. (a) A health care provider may use a policy of insurance issued by any of the following types of insurer as proof of financial responsibility:

- (1) An insurance company holding a certificate of authority from the department under [IC 27-1-6](#) or [IC 27-1-17](#).
- (2) A risk retention group domiciled in Indiana or a foreign risk retention group registered with the department.
- (3) An insurer that does not hold a certificate of authority from the department through one (1) of the following:
  - (A) A surplus lines transaction under [IC 27-1-15.8](#).
  - (B) An industrial insured transaction under [IC 27-4-5-2](#)(a)(8).
- (4) A captive insurer registered with the department under [IC 27-1-2-2.3](#).**

(b) The commissioner has the right to review the financial condition of any insurer used as proof of financial responsibility **as follows:**

- (1) An insurer shall have adequate assets to cover the reserves associated with all potential liabilities that are neither fronted by, nor reinsured with, an insurer. The commissioner may require an insurer to increase the funding if it is determined that the insurer's financial condition poses a financial risk to the PCF.
- (2) The commissioner may disapprove the use of an insurer as proof of financial responsibility if the commissioner determines, after notice and an opportunity to be heard, the insurer's financial condition poses a financial risk to the PCF. A disapproval must be in writing and served upon the insurer. If the insurer uses an agent to file proof of financial responsibility, service on that agent shall be considered service on the insurer.

(c) Upon request of the commissioner, an insurer shall provide a copy of the policy form and premium rates used as proof of financial responsibility.

(d) Claims made coverage or occurrence coverage may be used as proof of financial responsibility. No other policy type of coverage may be used as proof of financial responsibility until the policy form is:

- (1) submitted to the medical malpractice division of the department; and
- (2) approved by the commissioner, in writing, specifically for use as proof of financial responsibility under [IC 34-18-3](#) and [IC 34-18-4](#).

(e) The health care provider's coverage with the PCF is of the same coverage type and scope as the policy used for proof of financial responsibility. However, the PCF will not allow retroactive coverage that begins before the date of issue of the first policy of insurance from any insurer used as proof of financial responsibility for the PCF.

(f) A health care provider who fails to purchase a reporting endorsement policy will not be allowed PCF coverage for any claim made after the termination date of the final claims made coverage used as proof of financial responsibility for the PCF, unless the underlying insurer considers the claim to be covered under its policy language because it was previously reported.

(g) In the event a policy of insurance is rescinded, the health care provider's status as a qualified health care provider is similarly rescinded. The department will refund any surcharge that was received for the period that was subject to the rescission. The insurer shall notify the department within ten (10) days of any policy that is rescinded.

(h) If an insurer is placed into insolvency or receivership and the department has not previously disapproved

the insurer as acceptable for establishing financial responsibility under subsection (b), the following apply:

- (1) The health care provider remains a qualified health care provider.
- (2) The PCF is not responsible for any amounts due by the health care provider except as provided in [IC 34-18-15-4](#).
- (3) The PCF does not assume the insurer's obligation to pay costs to defend a claim.

(Department of Insurance; [760 IAC 1-21-2.5](#); filed Feb 2, 2007, 3:08 p.m.: [20070228-IR-760060032FRA](#); filed Apr 18, 2011, 11:34 a.m.: [20110518-IR-760100245FRA](#); readopted filed Nov 26, 2013, 3:43 p.m.: [20131225-IR-760130479RFA](#); filed May 18, 2018, 2:25 p.m.: [20180613-IR-760180069FRA](#))

SECTION 3. [760 IAC 1-21-7](#) IS AMENDED TO READ AS FOLLOWS:

#### [760 IAC 1-21-7](#) Cash deposits

Authority: [IC 34-18-5-4](#)

Affected: [IC 34-18-4-1](#)

Sec. 7. Cash deposited by a health care provider under [IC 34-18-4-1](#)(2) and this ~~regulation~~ **rule** may be deposited in an interest-bearing account in any bank located in Indiana. Such a deposit must be in a joint account under the control of the commissioner of Insurance and the health care provider. The health care provider may withdraw accrued interest from the account.

(Department of Insurance; Reg 22, Sec VII; filed Jan 27, 1977, 2:35 p.m.: Rules and Regs. 1978, p. 516; readopted filed Sep 14, 2001, 12:22 p.m.: 25 IR 531; filed Feb 2, 2007, 3:08 p.m.: [20070228-IR-760060032FRA](#); readopted filed Nov 26, 2013, 3:43 p.m.: [20131225-IR-760130479RFA](#); filed May 18, 2018, 2:25 p.m.: [20180613-IR-760180069FRA](#))

SECTION 4. [760 IAC 1-21-8](#) IS AMENDED TO READ AS FOLLOWS:

#### [760 IAC 1-21-8](#) Payment into patient's compensation fund; annual surcharge for ancillary provider

Authority: [IC 34-18-5-4](#)

Affected: [IC 27-1-6](#); [IC 27-1-17](#); [IC 27-7-10-14](#); [IC 34-18-5-2](#); [IC 34-18-5-3](#)

Sec. 8. The annual surcharge for an ancillary provider or independent ancillary provider shall be as follows:

- (1) An ancillary provider who is not an independent ancillary provider that purchases insurance as proof of financial responsibility shall pay one hundred percent (100%) of the premium charged by the insurer.
- (2) An ancillary provider who is not an independent ancillary provider that establishes financial responsibility by means other than insurance under section 3 of this rule shall pay an amount equal to one hundred percent (100%) of the premium that would be charged to the ancillary provider by IRMIA. The payment must be made each year under [IC 34-18-5-3](#) within thirty (30) days after qualification.
- (3) An independent ancillary provider's surcharge shall be calculated at the following percentage of the published surcharge for a specialty class 1 physician:
  - (A) Twenty percent (20%) for each dentist.
  - (B) One hundred thirty percent (130%) for each dentist - oral surgery.
  - (C) Twelve and one-half percent (12.5%) for each psychologist.
  - (D) Ninety-two and one-half percent (92.5%) for each podiatrist - no surgery.
  - (E) One hundred forty-five percent (145%) for each podiatrist - surgery.
  - (F) Twelve and one-half percent (12.5%) for each optometrist.
  - (G) Thirty-five percent (35%) for each nurse practitioner.
  - (H) One hundred fifty percent (150%) for each nurse midwife.
  - (I) Forty-five percent (45%) for each certified registered nurse anesthetist.
  - (J) Thirty-five percent (35%) for each physician assistant.
  - (K) Thirty-five percent (35%) for each clinical nurse specialist.
  - (L) Forty-five percent (45%) for each anesthesiologist assistant.**
- (4) An independent ancillary provider who provides health care on a part-time basis shall pay a reduced surcharge as follows:
  - (A) An independent ancillary provider who provides health care twelve (12) hours per week or less on an annual basis shall receive a credit equal to seventy-five percent (75%) of the surcharge amount.
  - (B) An independent ancillary provider who provides health care more than twelve (12) hours but fewer than

twenty-five (25) hours per week on an annual basis shall receive a credit equal to fifty percent (50%) of the surcharge amount.

(C) An independent ancillary provider who provides health care at least twenty-five (25) hours but fewer than thirty-one (31) hours per week on an annual basis shall receive a credit equal to twenty-five percent (25%) of the surcharge amount.

(Department of Insurance; Reg 22, Sec VIII; filed Jan 27, 1977, 2:35 p.m.: Rules and Regs. 1978, p. 516; filed Mar 18, 1986, 10:41 a.m.: 9 IR 2057, eff Apr 18, 1986; filed May 28, 1987, 4:00 p.m.: 10 IR 2298; filed Aug 13, 1991, 4:00 p.m.: 15 IR 7; filed Apr 29, 1999, 2:22 p.m.: 22 IR 2875; readopted filed Sep 14, 2001, 12:22 p.m.: 25 IR 531; filed Mar 18, 2005, 10:45 a.m.: 28 IR 2376; filed Feb 2, 2007, 3:08 p.m.: [20070228-IR-760060032FRA](#); filed Apr 18, 2011, 11:34 a.m.: [20110518-IR-760100245FRA](#); readopted filed Nov 26, 2013, 3:43 p.m.: [20131225-IR-760130479RFA](#); filed May 18, 2018, 2:25 p.m.: [20180613-IR-760180069FRA](#))

SECTION 5. [760 IAC 1-21-8.5](#) IS AMENDED TO READ AS FOLLOWS:

**[760 IAC 1-21-8.5](#) Payment into patient's compensation fund; annual surcharge for nursing homes**

**Authority:** [IC 34-18-3-7](#); [IC 34-18-5-2](#); [IC 34-18-5-4](#); [IC 34-18-6-6](#)

**Affected:** [IC 34-18-5-2](#); [IC 34-18-5-3](#)

Sec. 8.5. A nursing home shall calculate ~~their~~ **its** surcharge rate on a form prescribed by the department. The calculation shall include the following:

- (1) The actual number and type of beds licensed by the state department of health.
- (2) A per bed charge for for-profit facilities as follows:
  - (A) ~~Ninety-three~~ **Eighty-one** dollars and ~~two~~ **sixty-one** cents (~~\$93.02~~) (**\$81.61**) for each comprehensive nursing care bed.
  - (B) ~~Forty-two~~ **Thirty-seven** dollars and ~~ninety-three~~ **sixty-seven** cents (~~\$42.93~~) (**\$37.67**) for each residential nursing care bed.
- (3) A per bed charge for not-for-profit facilities as follows:
  - (A) ~~Seventy-seven~~ **Seventy-four** dollars and ~~fifty-two~~ **nineteen** cents (~~\$77.52~~) (**\$74.19**) for each comprehensive nursing care bed.
  - (B) ~~Thirty-five~~ **Thirty-four** dollars and ~~seventy-eight~~ **twenty-five** cents (~~\$35.78~~) (**\$34.25**) for each residential nursing care bed.
- (4) A charge for each employed physician covered by the nursing home.

(Department of Insurance; [760 IAC 1-21-8.5](#); filed Feb 2, 2007, 3:08 p.m.: [20070228-IR-760060032FRA](#); filed Apr 18, 2011, 11:34 a.m.: [20110518-IR-760100245FRA](#); filed May 29, 2012, 3:22 p.m.: [20120627-IR-760120046FRA](#); readopted filed Nov 26, 2013, 3:43 p.m.: [20131225-IR-760130479RFA](#); filed May 18, 2018, 2:25 p.m.: [20180613-IR-760180069FRA](#))

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